Supreme Court, U.S.
FILED
AUG 6 1993
OFFICE OF THE CLERK

No. 92-8579

IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

CHARLES K. ELDER,

Petitioner

v.

R. D. HOLLOWAY, *et al.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED APRIL 19, 1993
CERTIORARI GRANTED JUNE 28, 1993

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RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
9/30/88	Complaint Filed
6/1/89	Motion by plaintiff for partial summary judgment
8/30/90	Motion by defendants for summary judgment
11/6/90	Hearing on motions for summary judgment
11/21/90	Memorandum Opinion and Order
12/20/90	Notice of Appeal

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civil No. 88-1329

CHARLES K. ELDER and BEVERLY S. ELDER,
husband and wife,
Plaintiffs,

v.

R. D. HOLLOWAY, AND OTHER UNKNOWN EMPLOYEES AND AGENTS individually, and in their official capacity as police officers for the Ada County Sheriff's Office; VAUGHN KILLEEN, as Sheriff of Ada County; and the COUNTY OF ADA,
Defendants.

MEMORANDUM OPINION AND ORDER

I. FACTS AND PROCEDURE

This suit arises out of the arrest and seizure of the plaintiff, Charles Elder, on April 27, 1987. The defendants in this action are Lieutenant R. D. Holloway, the officer in charge of the arrest, Ada County Sheriff Vaughn Killeen, who was present during the arrest, the County of Ada, and other unknown employees and/or agents. After receiving certified copies of two Florida arrest warrants for the arrest of Mr. Elder, Defendant Holloway made arrangements to arrest Mr. Elder in a public place, his place of work. However, before Mr. Holloway could arrest Mr. Elder at his place of work, Mr. Elder and his

brother William Elder, who also worked at the same place, got word of the officer's intent, and left work early. Lt. Holloway and other officers, after finding out that the Elders had left work, proceeded to William Elder's residence, which was where Charles Elder was also residing at the time. The officers, once they arrived in the area, set up surveillance of the residence. They observed the Elder brothers loading what appeared to be camping equipment into a pickup. William Elder then was seen riding away from the home on horseback. The officers detained William, and confirmed with William that his brother was still in the house. William also told the officers that his brother had access to several firearms in the home. The officers then attempted to make telephone contact with Charles, but were unsuccessful until William used the police loudspeaker to convince Charles to answer the phone. By this time, other officers had arrived near the area and had blocked off the roads coming into the neighborhood. During the telephone conversation between Charles and William, the officers were advised that Charles had fallen inside the house after he suffered an epileptic seizure. During this conversation, Plaintiff Elder suffered another seizure. After he had recovered from this second seizure, Lt. Holloway began speaking on the phone with Charles. Lt. Holloway advised Charles that if he could not walk out of the house, then he should crawl out. After a few minutes, Charles did walk out of the residence. However, upon exiting the house, he took one step, turned slightly, and fell face down, hitting his head on the concrete walk which caused severe injuries. Emergency medical technicians were then called, and they arrived, treated Mr. Elder and transported him to the hospital.

Plaintiffs, Mr. Elder and his alleged common law wife, filed this suit on September 30, 1988. Three of the counts in the complaint pertain to alleged violations of 42 U.S.C. § 1983, and two counts deal with common law tort claims.

Plaintiffs claim that the arrest was a violation of Mr. Elder's constitutional rights which require that the defendants have a valid Idaho arrest warrant before seizing him in his home.

On June 1, 1989, the plaintiffs moved for partial summary judgment on Count One as against Lt. Holloway on the issue of liability. On July 6, 1989, the defendants filed their memorandum in opposition to this motion. The defendants, on August 30, 1990, filed their Motion for Summary Judgment. On October 19, 1990, the plaintiffs filed their memorandum in opposition to this motion, and on October 29, 1990, the defendants filed their reply brief.

On November 6, 1990, this court held a hearing on all pending motions to address the cross-motions for summary judgment. Having thoroughly reviewed the statements of counsel, along with the memoranda, affidavits, and exhibits in the record, and based upon the analysis to follow, the court has determined that defendants' Motion for Summary Judgment should be granted.

II. ANALYSIS

A. *Summary of Cross-Motions*

1. *Plaintiffs' Motion for Partial Summary Judgment.*

In this motion, plaintiffs seek summary judgment against Defendant Holloway on Count One as to his liability only. Count One is a claim against Lt. Holloway and his subordinates for the unreasonable seizure of Mr. Elder, which in turn resulted in Mr. Elder sustaining severe brain damage by his fall. Plaintiffs argue that without a valid Idaho arrest warrant, the defendants could not arrest Mr. Elder in his brother's home, unless there were exigent circumstances for a warrantless arrest. This is clearly the law, and the defendants do not dispute this. *State v. Bradley,*

106 Idaho 358, 679 P.2d 635 (1984) (where the court held that the officers cannot make a warrantless nonconsentual entry in the home of the suspect to arrest him, without exigent circumstances); *Payton v. New York,* 445 U.S. 573 (1980).

Plaintiffs argue that for all practical purposes, the arrest occurred in the home because Mr. Elder was restrained in the home, once the defendants "constructively crossed" the threshold of the home by surrounding the home and requesting by police loudspeaker and telephone that Mr. Elder come out. Memorandum in Support of Motion for Partial Summary Judgment, filed June 1, 1989, at 5-6. In support of this argument, the plaintiffs point to the following "undisputed facts": (1) several armed officers surrounded the house; (2) roadblocks were established in the area of the residence; (3) plaintiff's brother William was detained and prevented from returning to his home; (4) Lt. Holloway did intend to arrest Charles Elder; and (5) a police loudspeaker and telephone were utilized to communicate with Mr. Elder that he should surrender. *Id.* at 7.

2. *Defendant's Motion for Summary Judgment.*

Initially, the defendant sets forth the prima facia case for establishing a 42 U.S.C. § 1983 claim. Simply stated, the plaintiffs must prove: (1) that the conduct complained of was committed by a person under the color of state law, and (2) that the conduct deprived the plaintiff of a constitutional right. *Rinker v. County of Napa,* 831 F.2d 829, 831 (9th Cir. 1987). There is no dispute as to the first element. However, the defendants argue that none of plaintiff's constitutional rights were violated.

Defendants' arguments can be summarized as follows.

(a) *The arrest conducted outside the home was valid even without a valid Idaho arrest warrant.* The defend-

ants note that the plaintiffs argue that even though Idaho statutory law [1] can be interpreted as allowing an arrest without a warrant, the case law clearly requires that the officers have a valid Idaho arrest warrant to arrest an individual in his home. The defendants do not clearly dispute this; they simply attempt to distinguish *Bradley* and *Payton*, and argue that the arrest was made outside the home. Memorandum in Support of Motion for Summary Judgment, filed August 30, 1990, at 8-10.

(b) *If the court finds that this was a constructive entry, then the arrest was still valid because there existed probable cause (based on the information received and the existence of the Florida warrants) and Mr. Elder was in plain view. Id.* at 10-11. However, the court finds that this argument clearly does not take into consideration the courts' findings in *Bradley*, *Payton*, and *United States v. Santana*, 427 U.S. 38 (1976).

(c) *Exigent circumstances existed that would excuse the arrest warrant requirement.* Citing a variety of authorities, defendants set forth several factors which justify a finding of exigent circumstances in this case: (1) suspect believed to be wanted for crime of violence, (Elder was wanted for aggravated battery) *United States v. Salvador*, 740 F.2d 752 (9th Cir. 1984); (2) suspect believed to be armed (several individuals informed the officers that Elder possessed and had access to guns, and in addition, sources had stated that Elder told them that he would not be arrested and would shoot it out with police) *id.*; (3) there was a clear showing of probable cause (the magistrate's signature on Florida warrants) *United States v. Davis*, 785 F.2d 610 (8th Cir. 1986); (4) suspect believed to be in the premises (officers saw

[1] Idaho Code § 19-4514 (1987) provides in part: "The arrest of a person may be lawfully made . . . without a warrant upon reasonable information that the accused stands charged with a felony by the courts of another state . . . ."

Elder enter the house) *People v. Abney*, 407 N.E.2d 543 (1980); (5) likelihood of flight (brothers packing camper) *United States v. Williams*, 612 F.2d 735 (3d Cir. 1979); and (6) entry can be peaceable and during daylight hours (officers gave Elder an opportunity to surrender, the only possible entry was telephone contact with Elder, and these events occurred during the day) *United States v. Davis*, 785 F.2d 610 (8th Cir. 1986). Based on these factors, the defendants argue that a constructive entry was necessary in order to prevent the potential harming of others inside or outside the premises which was located in a residential area. Memorandum in Opposition to Plaintiffs' Motion for Partial Summary Judgment, filed July 6, 1989, at 18-23; Memorandum in Support of Motion for Summary Judgment, filed August 30, 1990, at 11-12.

(d) *If the court finds that no exigent circumstances existed, then the defendants are still protected by qualified good faith immunity doctrine.* The defendants note that this is an affirmative defense that must be proved by them; however, they note that courts have granted summary judgment on this issue if the pleadings and affidavits indicate that there are no genuine issues of material fact. *Id.* at 12 (*citing Harris v. City of Roseburg*, 664 F.2d 1121, 1129 (9th Cir. 1981), and *Kipps v. Ewell*, 538 F.2d 564, 566 (4th Cir. 1976)).

According to the defendants, the test for whether or not they are entitled to qualified immunity under the facts is, "[s]hould a reasonable person in the shoes of the individual police officer have known that he was violating another's . . . clearly established constitutional rights?" Memorandum in Support of Motion for Summary Judgment, filed August 30, 1990, at 14 (*citing Ngiraingas v. Sanchez*, 858 F.2d 1368, 1374 (9th Cir. 1988), *aff'd* —— U.S. ——, 110 S.Ct. 1737 (1990)). Applying this standard, the defendants claim that Lt. Holloway

knew he could not enter the home without a warrant; however, he in good faith believed he could serve the warrants outside the home in public without a valid Idaho warrant. Defendants argue that the law is unclear in Idaho, as to whether there can be a "constructive entry," and therefore, defendants' conduct did not violate clearly established statutory or constitutional law. Memorandum in Support of Motion for Summary Judgment, filed August 30, 1990, at 12-14.

(c) *There is no affirmative link between the alleged violations and the adoption of a policy authorizing the alleged misconduct; therefore, the claims against Ada County and the Sheriff should be dismissed.* Under the law, a municipality cannot be held liable on a respondeat superior theory unless there exists an affirmative link between the violations complained of and the adoption of any plan or policy of the agencies or persons showing authorization or approval of the misconduct. *Monell v. Department of Social Serv. of New York*, 436 U.S. 658, 691 (1978); *Rizzo v. Goode*, 423 U.S. 362, 370 (1976). The defendants also cited a Sixth Circuit case which, in addressing this standard, stated:

> The result of *Rizzo*, and subsequent cases in the lower federal courts applying the standards it announced is that a failure of a supervisory official to supervise, control, or train the offending individual officers is not actionable absent a showing that the official either encouraged the specific incident of misconduct or in some other way directly participated in it. At a minimum a plaintiff must show that the official at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers.

Hays v. Jefferson County, Kentucky, 668 F.2d 869, 874 (6th Cir.), *cert. denied*, 459 U.S. 833 (1982).

Applying this standard, the defendants argue that there is no evidence that Sheriff Killeen's or Ada County's failure to supervise or train their officers caused any injury to the plaintiffs. There is no evidence in the record to indicate that these officials in any manner authorized, approved or knowingly acquiesced in the alleged unconstitutional conduct of the officers making the arrest.[2] Memorandum in Support of Motion for Summary Judgment, filed August 30, 1990, at 17-18.

In addition, the defendants in oral arguments cited the court to *Pembaur v. Cincinnati*, 475 U.S. 469 (1986), a United States Supreme Court decision where the court further clarified the defendants' position that Ada County and the Sheriff cannot be found liable under Section 1983 because they did not make a deliberate choice to make public arrests in the manner executed by Lt. Holloway in this case. In *Pembaur*, the Court stated:

> We hold that municipal liability under § 1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question.

Id. at 483-84.

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[2] It should be noted that according to Lt. Holloway's deposition, the Sheriff, although present at the scene, did not give any orders or take part in the arrest.

> "Q All right. Now, was the sheriff himself involved—I'm talking Vaughn Killeen—in this incident?
> "A [Lt. Holloway] He was at this incident.
> "Q Okay. What was his role?
> "A He didn't do anything, other than he was there, observed what was happening, and obviously was my supervisor. But as far as giving directions on this situation, he was not involved in it."

Reply Memorandum in Support of Motion for Summary Judgment, filed Oct. 29, 1990, Excerpts of Holloway Deposition at 18.

(f) *Count Four of the Complaint falls within Idaho Code § 6-904, and therefore should be dismissed.* Idaho Code § 6-904 [3] provides for governmental immunity for false arrests. Defendants' claim that the plaintiffs in Count Four are seeking damages against Ada County and the Sheriff for injuries they sustained as a result of a false arrest, and that pursuant to Section 6-904, these parties are not liable for these claims. They also assert that the plaintiffs cannot seek redress for both a Section 1983 claim and a common law tort claim, because these claims both seek the same relief. Memorandum in Support of Motion for Summary Judgment, filed August 30, 1990, at 18-19.

(g) *The consortium loss claim, Count Five, should also be dismissed as it is wholly derivative of the other claims.* Defendants argue that if the other counts are dismissed, then this count fails as a matter of law as a consortium claim is a derivative claim. *Runcorn v. Shearer Lumber Prod., Inc.*, 107 Idaho 389, 394, 690 P.2d 324, 329 (1984). Defendants also assert that the claim should fail because the plaintiffs were not married at the time Mr. Elder was injured. They were divorced in 1974 and lived with each other off and on through February of 1987. They reject plaintiffs' argument that they had a valid common law marriage, and argue that Florida law does not recognize common law marriages after 1967. Memorandum in Support of Motion for Summary Judgment, filed August 30, 1990, at 19-20.

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[3] Idaho Code § 6-904 (1990) provides in part that:

> A governmental entity and its employees while acting within the course and scope of their employment and without malice or criminal intent shall not be liable for any claim which:
>
> . . . .
>
> 3. Arises out of assault, battery, false imprisonment, *false arrest*, malicious prosecution, abuse of process, libel, slander, misrepresentation . . . . (emphasis added)

In their reply brief, defendants assert that Michigan law also does not recognize common law marriages after 1957, so that Idaho would be the only law that the plaintiffs could make this claim under. They argue that a close reading of Beverly Elder's deposition will indicate that no common law marriage existed in Idaho. They claim that in the deposition, Ms. Elder indicates that when they lived in Idaho, they did not live together, nor did they consider themselves married.

B. *Analysis of Pending Motions.*

1. *The validity of the arrest.*

The threshold question that this court must address as it considers these cross-motions for summary judgment is, whether or not it is clearly established in Idaho law that an officer, under the circumstances of this case—where officers surrounded the house, requested the individual to exit the house and that individual complies—must have a valid Idaho arrest warrant in order to arrest that individual. This court finds that there is no clearly established statutory or case law in Idaho or the Ninth Circuit which addresses this issue. It is not disputed among the parties that if the arrest would have actually occurred in the home, then the officers would have had to have a valid Idaho arrest warrant, and possibly a valid Idaho search warrant.[4]

The Idaho Supreme Court in *State v. Bradley*, 106 Idaho 358, 670 P.2d 635 (1983), following the law announced by the United States Supreme Court in *Payton v. New York*, 445 U.S. 573, 577 (1980), found that

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[4] The search warrant may have been required in that the home that Charles Elder was residing in at the time, the home at which the arrest was made, was the home of his brother, William Elder. The court notes that this issue was not addressed by the parties, and therefore, this court will not review this issue.

absent exigent circumstances or consent, officers must have a valid Idaho arrest warrant to enter a defendant's private residence in order to make an arrest, even if the officers have a valid arrest warrant from a sister state. The law in this area, where this is an actual entry into the home, is, therefore, clearly established.

Unfortunately, that is where the clarity ends. The court has found no Idaho or Ninth Circuit law which addresses the issue of whether a valid Idaho arrest warrant is necessary in order to make a "constructive entry" into the home to make an arrest. The court was also unsuccessful in finding any law in Idaho or the Ninth Circuit that addresses the issue of what constitutes a "constructive entry" or "constructive crossing of the threshold."

The plaintiffs cite the court to two cases, *State v. Holeman*, 103 Wash.2d 426, 693 P.2d 89 (1985), and *Scroggins v. State*, 276 Ark. 177, 633 S.W.2d 33 (1982), which they claim are persuasive in this area. However, neither of these cases are directly on point, and neither case is from this state or this circuit. In *Holeman*, the officers who executed the arrest reached through the doorway and physically grabbed the individual who was standing in the doorway. The court there held that this was clearly a crossing of the threshold which required an arrest warrant.

In *Scroggins*, the court dealt with the situation in which the officers knocked on the door of the suspects' motel room and when the suspects answered, they pulled their guns and ordered the suspects out of the house. Once the suspects exited the motel, the officers effectuated the arrest. The court does not find *Holeman* and *Scroggins* persuasive as they both are clearly distinguishable from the case at bar. In the case at bar, the officers did not physically cross the threshold to grab Mr. Elder by the arm and pull him out of the house, nor did the officers knock on the door, wait for Mr. Elder to answer, and

then pull their guns on him and demand that he come out of the house.

The case law in this area clearly supports the view that the significant point of analysis is the threshold, and that if the person is outside his doorway, in an area with public access, then he no longer has the protection of requiring a warrant. *State v. Bradley*, 106 Idaho 358, 679 P.2d 635 (1984); *United States v. Karagozian*, 715 F.Supp. 1160 (D.Conn. 1989) (where the court held that a secluded rear deck of a home still has the same privacy expectations as the home because this is not a place, like the driveway, with ready access to visitors, nor was it visible to the public). Based on this analysis, the court finds that once Mr. Elder stepped out of the front door of his brother's house, onto the public access sidewalk of the home, a public arrest was made unless he can show that he did not exit the house voluntarily, or unless he can show that the area where he was arrested was secluded from public access and deserving of the same expectation of privacy as the home itself. These questions clearly present genuine issues of material facts that prevent this court from entering summary judgment on this issue.

The Eighth Circuit, in *Duncan v. Storie*, 869 F.2d 1100 (8th Cir.), *cert. denied*, —— U.S. ——, 110 S.Ct. 85 (1989), addressed a similar question concerning similar facts. In *Duncan*, the plaintiff brought a Section 1983 claim, alleging unlawful arrest and excessive use of force. The main question in the case was whether a public arrest occurred in the doorway of the plaintiff's house. Because the court found that there existed genuine issues of material fact concerning whether or not a public arrest was made, the court refused to grant summary judgment. The court summed up the law in this area very clearly when it stated:

Depending upon whether Duncan was arrested in his home or outside in a public place, different standards apply . . . . If an individual voluntarily left the confines of his home, as Storie and Whitted claim that Duncan did, then the arrest was made in a public place. *United States v. Santana*, 427 U.S. 38, 42, 96 S.Ct. 2406, 2409, 49 L.Ed.2d 300 (1976). Under these circumstances, the individual has no expectations of privacy and the arresting officers need only demonstrate that there was probable cause in order to justify a warrantless arrest. . . . However, a warrantless arrest that occurs inside an individual's home is unconstitutional unless the officers demonstrate the existence of probable cause and exigent circumstances.

The doorway of an individual's home or apartment or hotel room may be a public place for the purpose of making a warrantless arrest *if the individual has come to stand in the doorway voluntarily. See United States v. Whitten*, 706 F.2d 1000, 1015 (9th Cir. 1983). However, an individual who is *compelled* to stand in a doorway cannot be lawfully arrested without the existence of probable cause and exigent circumstances.

Duncan v. Storie, 869 F.2d at 1102 (citations and footnote omitted) (emphasis added).

The *Duncan* court emphasized that the focus should not be on the exact location of the individual in relation to the doorway, but instead, the crucial issues are whether the individual had an expectation of privacy, and whether the individual came to the door voluntarily. *Id.* Applying this law, the court, in denying defendant's motion for summary judgment, found that it could not hold as a matter of law, that the individual "voluntarily placed himself in a public place and willingly relinquished the expectation of privacy that he is entitled to when he is within his home." *Id.* at 1103.

Applying this analysis to the facts in this case provides the court with ample grounds to deny plaintiffs' Motion for Partial Summary Judgment, and defendants' Motion for Summary Judgment on the issue of whether the arrest was valid. The court finds that there still are genuine issues of material fact concerning whether Mr. Elder placed himself voluntarily in a public place, and whether he willingly relinquished his expectation of privacy. As noted above, the defendants argue that they did not coerce Mr. Elder out of the home, but instead, that Mr. Elder's brother was the one who talked to Mr. Elder on the phone and police loudspeaker. They further assert that if Mr. Elder would not have come out into the public place voluntarily, *then* they would have obtained an Idaho search and arrest warrant. The court finds that there is ample evidence to support a finding that there still exists genuine issues of material fact on this issue.

2. *Exigent circumstances.*

If this court were to hold that there was a "constructive entry" into the home, and therefore, the defendants had to obtain a valid Idaho arrest warrant, the defendants argue that the warrant requirement would be excused because of the existence of exigent circumstances. As noted above, the defendants cite several factors that Lt. Holloway testified to in his deposition that constitute exigent circumstances. Despite conceding that Mr. Elder was wanted for felony charges in Florida, and that he said he would not be arrested, and that he had access to guns in the house, plaintiffs argue that these factors alone or together do not constitute exigent circumstances. Plaintiffs' Response to Defendants' Memorandum in Support of Motion for Summary Judgment, filed Oct. 19, 1990, at 5-6.

Plaintiffs argue that under *Michigan v. Tyler*, 436 U.S. 499, 509 (1978), the unifying question under the case law for determining whether exigent circumstances exist,

is whether or not "there is compelling need for official action and no time to secure a warrant." Plaintiffs assert that the warrantless entry should be upheld only if there was "a 'compelling need' to avoid an imminent risk of danger to life or property, destruction or loss of evidence, or escape of the suspect." Plaintiffs' Response to Defendant's Memorandum in Support of Motion for Summary Judgment, filed on Oct. 19, 1990, at 6-7 (citation omitted).

The plaintiffs assert that the facts indicate that this was not an exigent circumstance because the police had planned the arrest five days before the incident, and that the police themselves created the exigency by surrounding the home and ordering Mr. Elder out of the house. They argue that there was not a compelling need to suspend the warrant requirement because there was not any risk of danger to anyone, there was no risk of evidence being destroyed, and there was no risk of flight. *Id.* at 7-10. These assertions alone clearly create genuine issues of material facts. This court, therefore, finds that whether or not, under these circumstances, exigent circumstances existed to excuse the requirement that officers have a valid Idaho arrest warrant is a question of fact, which prevents this court from entering summary judgment in favor of the defendants on this issue.

3. *Qualified immunity.*

This court's analysis on whether or not there was a valid arrest under the circumstances in this case controls the outcome on the issue of qualified immunity. Plaintiffs, under their Section 1983 claims, argue that they are entitled to recover against the defendants because the defendants violated clearly established constitutional rights, specifically, Mr. Elder's right not to be arrested in his brother's home without a valid Idaho arrest warrant. Defendants assert that even if the court were to find that a valid Idaho arrest warrant was required to make an

arrest, and even if the court found that there were no exigent circumstances to justify the warrantless arrest, the court must still find in favor of the defendants because they are protected by the doctrine of qualified good faith immunity. The court is persuaded by defendants' argument.

In *Malley v. Briggs*, 475 U.S. 335 (1986), the Supreme Court, in further defining the qualified immunity standard set forth in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), stated: "Defendants will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue; but if officers of reasonable competence could disagree on this issue, immunity should be recognized." *Malley v. Briggs*, 475 U.S. at 341. *See also, Los Angeles Police Protective League v. Gates*, 907 F.2d 879, 887-88 (9th Cir. 1990).

In terms of this case, the defendants restate this standard as "whether no reasonable officer could have believed that an Idaho warrant was not required for an arrest upon Bill Elder's front porch." Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment, filed July 6, 1989, at 15. In *Ngiraingas v. Sanchez*, 858 F.2d at 1374, the Ninth Circuit, in adopting the Third Circuit's standard, stated that:

> Deciding whether a police officer has acted in good faith is no easy task. As a general matter, however, we note that good faith immunity is judged "by an objective standard, not by examination of the subjective state of mind of the officer." . . . *The relevant question is . . . "[W]ould or should a reasonable person in the shoes of the individual police officer have known that he was violating another's . . . clearly established constitutional rights . . ."?*

Id. (citation omitted) (emphasis added).

As stated above, the law is clearly established that absent consent or exigent circumstances, officers must obtain a valid arrest warrant prior to crossing the threshold of a home to arrest an individual. *State v. Bradley*, 106 Idaho 358, 670 P.2d 635 (1983); *Payton v. New York*, 445 U.S. 573, 577 (1980). However, the law is not clear—in fact, the court has found no controlling Idaho or Ninth Circuit case law—on the issue of "constructive crossing of the threshold." The law is uncertain as to what even constitutes a "constructive crossing." These questions appear to be questions of fact, that must be dealt with on a case-by-case basis. There is certainly no statutory or case law that provides that a constructive crossing of the threshold occurs when the officers surround the house, and then attempt to make contact with the individual in the home.

Therefore, the defendants in this case could not have been violating plaintiff's clearly established rights when the law was far from certain as to when a constructive entry occurs, and there exists no official policy relating to getting a suspect out of his home by telephone or police loudspeaker. There is no way that any individual officer, under the circumstances of this case, could have known that he was violating another's clearly established constitutional rights when those rights were not yet clearly established. Until the law is better defined, it appears to this court that officers in similar circumstances could make an arrest outside the home if they in good faith believed that they could effectuate the arrest without violating any clearly established constitutional rights. The officers in this case clearly acted reasonably under the circumstances as it was their understanding of the law, and it was provided for in Ada County's arrest and custody policy [5],

[5] *See* Exhibit D attached to Plaintiffs' Response to Defendants' Memorandum in Support of Motion for Summary Judgment, filed October 19, 1990, which is a copy of Ada County's "arrest and custody" policy that was in effect at the time of the arrest.

that as long as they made the arrest outside the home, they could make the arrest without an Idaho arrest warrant. It appears from the record that officers reasonably believed that their actions were constitutional; therefore, no liability attaches to their actions.

4. *Application of summary judgment standard.*

In *Harris v. City of Roseburg*, 664 F.2d 1121 (9th Cir. 1981), the Ninth Circuit, in addressing the doctrine of qualified good faith immunity, has stated that even though this defense is an affirmative defense that must be proved by the police officers, summary judgment is still appropriate if the pleadings and affidavits indicate that there are no genuine issues of material fact. In affirming the district court's granting of summary judgment in favor of the police officers, the court stated:

> "The non-movant has an affirmative duty to come forward to meet a properly supported motion for summary judgment . . . ." [W]e find that the affidavits and depositions set forth facts, which, if accepted, would entitle Bergman [the officer] to summary judgment. With respect to Bergman's good faith defense, plaintiff has not raised any triable issues of fact as to whether Bergman reasonably believed that his actions were proper.

Id. at 1129-30 (citation omitted).

It is well settled that a party in defending against a motion for summary judgment may not simply rest upon the bare pleadings.[6] As the Ninth Circuit stated in *United*

[6] *See also* Fed. R. Civ. P. 56(e), which provides in part:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is an genuine issue for trial. If the adverse party does

States v. Allen, 578 F.2d 236 (9th Cir. 1978): "In order successfully to oppose a motion for summary judgment, a party may not rely solely on conclusory allegations in the pleadings . . . but must, instead, offer some evidence at least outlining a factual dispute." *Id.* at 237 (citations omitted).

Moreover, under Rule 56, it is clear that an issue in order to preclude entry of summary judgment must be *both* "material" and "genuine." An issue is "material" if it affects the outcome of the litigation. An issue, before it may be considered "genuine," must be established by "sufficient evidence supporting the claimed factual dispute . . . to require a jury or judge to resolve the parties' differing versions of the truth at trial." *Hahn v. Sargent*, 523 F.2d 461, 464 (1st Cir. 1975) (*quoting First Nat'l Bank of Arizona v. Cities Serv. Co., Inc.*, 391 U.S. 253, 289 (1968)). The Ninth Circuit cases are in accord. *See e.g., British Motor Car Distrib., Ltd. v. San Francisco Automotive Indus. Welfare Fund*, 882 F.2d 371 (9th Cir. 1989).

According to the Ninth Circuit in order to withstand a motion for summary judgment a party

> (1) must make a showing sufficient to establish a genuine issue of fact with respect to any element for which it bears the burden of proof; (2) must show that there is an issue that may reasonably be resolved in favor of either party; and (3) must come forward with more persuasive evidence than would otherwise be necessary when the factual context makes the non-moving party's claim implausible.

Id. at 374 (citation omitted).

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not so respond, summary judgment, if appropriate, shall be entered against the adverse party."

U.S.C.S. Rules of Civil Procedure, Rule 56(e) (Law. Co-op. 1987 & Supp. 1990).

The court finds that on the issue of whether the officers acted in good faith when they arrested Mr. Elder without a warrant outside his brother's home, the plaintiffs have failed to raise any triable issues of fact as to whether Lt. Holloway believed that his actions were proper.

C. *Conclusion*

Based on the foregoing analysis, the applicable standards under Rule 56, and the direction given by the Ninth Circuit in considering these issues, the court finds under the doctrine of qualified good-faith immunity, the defendants are entitled to summary judgment. Because all the other claims asserted by the plaintiffs are derivative of the claims against the officers—that is, without a finding that the officers had violated plaintiffs' rights, the plaintiffs could not prevail on their other claims—the court finds that Ada County and Sheriff Vaughn Killeen are also entitled to summary judgment. The plaintiffs have failed to offer any evidence of an official policy of Ada County or the Sheriff's Department, which would make them liable under Section 1983. Plaintiffs' claim for loss of consortium must also fail as a matter of law, as this claim is wholly contingent upon plaintiffs' success on the underlying tort claims. *Runcorn v. Shearer Lumber Prod., Inc.*, 107 Idaho 389, 394, 690 P.2d 324, 329 (1984).

III. ORDER

Based on the foregoing and the court being fully advised in the premises,

IT IS HEREBY ORDERED that plaintiffs' Motion for Partial Summary Judgment, should be and hereby is, DENIED in its entirety.

IT FURTHER ORDERED that defendants' Motion for Summary Judgment, should be and hereby is, GRANTED.

DATED this 20 day of November, 1990.

s/ Harold L. Ryan
HAROLD L. RYAN
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

(Caption Omitted in Printing)

JUDGMENT

Based upon this court's Memorandum Opinion and Order dated November 20, 1990, and the court being fully advised in the premises,

IT IS ORDERED AND ADJUDGED that plaintiffs take nothing against the defendants, and that this action be dismissed.

DATED this 21 day of November, 1990.

/s/ Harold L. Ryan
HAROLD L. RYAN
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 91-35146

D.C. No. CV-88-1329-HLR

CHARLES K. ELDER; BEVERLY S. ELDER,
husband and wife,
Plaintiffs-Appellants,

v.

R. D. HOLLOWAY; OTHER UNKNOWN EMPLOYEES AND/OR AGENTS, individually and in their official capacity as police officers for the Ada County Sheriff's Office, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Idaho
Harold L. Ryan, District Judge, Presiding

Argued and Submitted
October 8, 1991—Seattle, Washington

Filed December 19, 1991

Before: J. Clifford Wallace, Chief Judge, Procter Hug, Jr. and Pamela Ann Rymer, Circuit Judges

Opinion by Judge Rymer

OPINION

RYMER, Circuit Judge:

This appeal raises an unusual question: whether a summary judgment on qualified immunity in favor of a law enforcement officer which was properly granted on the record presented to the district court, should nevertheless be reversed because there are legal authorities that plaintiff did not present to the district court or to us on appeal which suggest that, contrary to what the district court found, the law was clearly established at the time of the incident. Because the plaintiff bears the burden of proof on the issue, we affirm.

After receiving word that Charles Elder, who was wanted on Florida warrants and considered dangerous, was in town, officer R.D. Holloway and others in the Ada County Sheriff's Office made plans to arrest him outside his place of work. Elder and his borther William got wind of the officers' plans, however, left work early, and returned to William's house (where Elder was living, too). Holloway and a number of other officers set up surveillance at the house. When William tried to ride away on horseback, he was detained. Officers found out that Elder had access to weapons in the house. Eventually, Holloway and William made telephone contact with Elder, who meanwhile had suffered two epileptic seizures. Holloway advised him that if he was unable to walk out of the house, he should crawl. Elder walked out a few minutes later, but fell face down, hitting his head and sustaining severe injuries. This happened on April 27, 1987.

Elder's 42 U.S.C. § 1983 action claims these events violated his constitutional right not to be arrested in his home without a valid Idaho warrant. Holloway's motion for summary judgment on the ground of qualified im-

munity was granted because the court found no Idaho or Ninth Circuit law that addressed the issue of whether a valid Idaho warrant was necessary to make a "constructive entry" into a home to arrest an occupant.

As the trial judge's memorandum opinion and order notes, Elder cited two cases to the court, *State v. Holeman*, 103 Wash. 2d 426, 693 P.2d 89 (1985), and *Scroggins v. State*, 276 Ark. 177, 633 S.W.2d 33 (1982). Based on these cases and its reading of *Payton v. New York*, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980), the district court concluded that the law was not clear on the issue of "constructive crossing of the threshold." Accordingly, it ruled in Holloway's favor on qualified immunity.

We have no difficulty with the district court's decision on the record it was presented. Neither case Elder relied upon clearly established whether an arrest takes place inside or outside the home, when the suspect is inside but is summoned outside by law enforcement officers who have surrounded the premises.

There was, however, Ninth Circuit authority, long in place, which is closely on point and could make a difference in the outcome of this case. In *United States v. Al-Azzawy*, 784 F.2d 890 (9th Cir. 1985), *cert. denied*, 476 U.S. 1144, 106 S. Ct. 2255, 90 L. Ed. 2d 700 (1986), police surrounded the suspect's house and, with weapons drawn, ordered him to leave. When he emerged, he was taken into custody. We held that, even though he had exited the house and was physically seized outside, he "was arrested inside his residence without a warrant." *Id.* at 893. In so holding, we reaffirmed the rule that " 'it is the location of the arrested person, and not the arresting agents, that determines whether an arrest occurs within a home.' " *Id.* (quoting *United States v. Johnson*, 626 F.2d 753, 757 (9th Cir. 1980), *aff'd on other grounds*, 457 U.S. 537, 102 S. Ct. 2579, 73 L. Ed. 2d 202 (1982)). The Sixth Circuit had also held to the same effect in *United States v. Morgan*, 743 F.2d 1158, 1166-67 (6th Cir. 1984), *cert. denied*, 471 U.S. 1061, 105 S. Ct. 2126, 85 L. Ed. 2d 490 (1985).[1] Thus, that principle was clearly established at the time of Elder's arrest.[2]

The problem, of course, is that none of these cases were called to the attention of the district court. The question, therefore, is whether we should now reverse. We conclude that we should not, for the following reasons.

First, we have said that a § 1983 plaintiff bears the burden of showing that the constitutional right purportedly violated was clearly established at the time of the official's conduct. *Baker v. Racansky*, 887 F.2d 183, 186 (9th Cir. 1989). Although the state of the law at the time the incident occurred is a question for the court, rather than a jury, to decide, in the unique context of qualified immunity it is akin to a question of fact. What the law was is inextricably intertwined with the merits of the issue, such that a court cannot properly resolve a police officer's motion for summary judgment without determining whether, on the one hand, the law was clearly established and, on the other, whether the law enforcement official would reasonably have known he was violating the plaintiff's constitutional rights by his conduct on

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[1] The Eighth Circuit is now in accord, *see Duncan v. Storie*, 869 F.2d 1100 (8th Cir.), *cert. denied*, 493 U.S. 852, 110 S. Ct. 152, 107 L. Ed. 2d 110 (1989). However, *Duncan* was handed down after the incident at issue in this case. Therefore, it is not relevant on the question of Holloway's good faith belief, and Elder's reliance on it on appeal is inappropriate.

[2] *Al-Azzawy* went on to hold that exigent circumstances justified the warrantless arrest. 784 F.2d at 894. Holloway urges that no matter what, this renders the law uncertain. Given our disposition, it is not necessary to resolve this question.

the particular occasion. Unless the plaintiff presents legal authorities that bear on the point, he fails to carry his burden.

Second, it goes without repeating that we never consider *facts* not presented to the district court. *United States v. Elias*, 921 F.2d 870, 874 (9th Cir. 1990). By the same token, we normally do not consider *legal issues* not raised or ruled upon in the district court. Examples include those matters that can be urged by way of a Rule 12 motion that are waived unless made with the answer, *see, e.g.*, Fed. R. Civ. P. 12(h)(1) (defenses of lack of personal jurisdiction, improper venue, insufficiency of process, and insufficiency of service of process waived if omitted from pre-answer motion, if any, or answer); *Benny v. Pipes*, 799 F.2d 489, 492 (9th Cir. 1986) (A "general appearance or responsive pleading by a defendant that fails to dispute personal jurisdiction will waive any defect in service or personal jurisdiction."), *amended on other grounds*, 807 F.2d 1514 (9th Cir.), *cert. denied*, 484 U.S. 870, 108 S. Ct. 198, 98 L. Ed. 2d 149 (1987); *Chilicky v. Schweiker*, 796 F.2d 1131, 1135-36 (9th Cir. 1986) (if party files pre-answer motion but fails to raise defense of lack of personal jurisdiction in that motion, defense is waived), *rev'd on other grounds*, 487 U.S. 412, 108 S. Ct. 2460, 101 L. Ed. 2d 370 (1988); issues that could have been joined by a motion for directed verdict, but cannot be pressed on appeal unless that motion is made, *see, e.g., Gilchrist v. Jim Slemons Imports, Inc.*, 803 F.2d 1488, 1493 (9th Cir. 1986) (sufficiency of evidence not reviewable on appeal unless motion for directed verdict was made in trial court); *United States v. 33.5 Acres of Land*, 789 F.2d 1396, 1400 (9th Cir. 1986) (same, but noting limited exception for plain error resulting in manifest miscarriage of justice); and errors in instructions that are waived unless an objection is timely made or instructions reflecting contrary law are submitted before the jury goes out, *see e.g.*, Fed. R. Civ.

P. 51 (no party can challenge jury instructions on appeal unless objection made before jury retires); *Hammer v. Gross*, 932 F.2d 842, 847-48 (9th Cir.) (en banc) (party cannot challenge jury instructions on appeal if not objected to in district court prior to jury retiring; there is no plain error exception to this rule), *cert. denied*, 60 U.S.L.W. 3154 (Dec. 2, 1991). Furthermore, the relevant record on review of summary judgments is the record as it existed at the time the motion was considered. *Harkins Amusement Enter., Inc. v. General Cinema Corp.*, 850 F.2d 477, 482 (9th Cir. 1988), *cert. denied*, 488 U.S. 1019, 109 S. Ct. 817, 102 L. Ed. 2d 806 (1989). We see no meaningful distinction between these procedures and this one.

Third, for us to reverse on account of law that could and should have been known to counsel at the time the summary judgment motion was under consideration would violate the spirit of the first rule of the Federal Rules of Civil Procedure. Rule 1 mandates that the rules "be construed to secure the just, speedy, and inexpensive determination of every action." This includes Rule 56 on summary judgments. In this case, a summary judgment was entered that is arguably erroneous because the person with the burden to do so, failed to find or produce relevant Ninth Circuit authority. Had he done so at the right time and in the right forum, the adverse judgment might have been avoided. So, too, would this appeal. In these circumstances, failing to hold Elder to the case he chose to present would fly in the face of Rule 1.

Fourth, given the hybrid nature of the issue, and the fact that the plaintiff has the burden of showing that the law was clearly established, for us to step in now would have the effect of putting the court on counsel's legal staff. We have great concern that this does not comport with our overriding obligation to be fair and impartial to all sides. More significantly, to reverse because of legal authority not called to the attention of the district court,

when the state of the law is the heart of the qualified immunity issue on summary judgment, would necessarily mean that we expect the district court to research independently the applicable law whenever qualified immunity is at issue. While to do so is commendable and encouraged, we are reluctant to require it at the cost of reversible error, at least when the error is not so obvious or fundamental as to result in a denial of due process. To impose this burden on a district judge would put him or her back in the business of practicing law, and to that extent implicates the court's impartiality. *Cf. Jacobsen v. Filler*, 790 F.2d 1362, 1365 n.7 (9th Cir. 1986). It would also shift to the court the burden we have put on the plaintiff. That we are bound not to do. *Pratt v. McCarthy*, 850 F.2d 590, 593 (9th Cir. 1988) (only en banc court has power to reject circuit precedent).

Finally, in this case we cannot say that injustice has occurred. Neither counsel nor the court found *Al-Azzawy*. We are hard pressed to conclude that, given that failure, the law was sufficiently clear that a reasonable law enforcement officer in Holloway's shoes would understand that what he was doing violated a constitutional right.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

(Caption Omitted in Printing)

Appeal from the United States District Court
for the District of Idaho
Harold L. Ryan, District Judge, Presiding

Argued and Submitted October 8, 1991
Seattle, Washington

Filed December 19, 1991
Amended: September 17, 1992

Before: WALLACE, Chief Judge, HUG and RYMER, Circuit Judges

Opinion by Judge Rymer

AMENDED OPINION

RYMER, Circuit Judge:

This is a 42 U.S.C. § 1983 action in which Charles Elder claims that his constitutional right not to be arrested inside his home without a valid Idaho warrant was violated when law enforcement officers, after setting up armed surveillance, called him to come outside the house and arrested him on the porch. In opposition to the officers' motion for summary judgment on qualified immunity, Elder proffered three out-of-state cases to show that the law was clearly established that a warrant was required to make a "constructive entry" into the house. The district court found on the basis of those cases that

the law was not clear, and ruled in favor of the officers. We agree with the district court's analysis. There is, however, Ninth Circuit authority which was not called to the attention of the district court that might have alerted a reasonable officer to the constitutional implications of putting a suspect under arrest after he had come outside his house pursuant to an order to exit.

Elder's appeal thus raises a narrow question: whether a summary judgment on qualified immunity in favor of a law enforcement officer which was properly granted on the record presented to the district court, should nevertheless be reversed because there are legal authorities that plaintiff did not present to the district court or to us on appeal which suggest that, contrary to what the district court found, the law was clearly established at the time of the incident. Because the plaintiff in a § 1983 action confronted with a request for judgment on grounds of qualified immunity bears the burden of proving that the constitutional right allegedly violated was clearly established at the time of the incident, we affirm.

I

After receiving word that Charles Elder, who was wanted on Florida warrants and considered dangerous, was in town, officer R.D. Holloway and others in the Ada County Sheriff's Office made plans to arrest him outside his place of work. Elder and his brother William got wind of the officers' plans, however, left work early, and returned to William's house (where Elder was living, too). Holloway and a number of other officers set up surveillance at the house. When William tried to ride away on horseback, he was detained. Officers found out that Elder had access to weapons in the house. Eventually, Holloway and William made telephone contact with Elder, who meanwhile had suffered two epileptic seizures. Holloway advised him that if he was unable to walk out of the house, he should crawl. Elder walked out a few

minutes later, but fell face down, hitting his head and sustaining severe injuries. This happened on April 27, 1987.

Elder's complaint alleges that these events violated his constitutional right not to be arrested in his home without a valid Idaho warrant. Both parties moved for summary judgment.

On the issue of qualified immunity, Elder argued in the district court that the law was clearly established that an Idaho warrant was required to make a "constructive entry" over the threshold. He proffered *Payton v. New York*, 445 U.S. 573 (1980), for the proposition that, as of April 27, 1987 (when the incident occurred), it was clearly established that the Fourth Amendment prohibited a warrantless entry into a suspect's home to make a routine felony arrest absent consent or exigent circumstances. No one disputed this general principle, and the district court correctly recognized that the law, where there is an actual entry into the home, is clearly established.

Nor did the parties disagree about "the level of generality at which the relevant 'legal rule' is to be identified." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). They disagreed whether, in 1987, there was binding precedent which clearly established when an arrest "constructively" takes place inside a house if no law enforcement officer steps inside the door and the suspect is physically placed under arrest outside the door. Elder proffered three cases in support of his claim that the law clearly established that there was a "constructive entry": *State v. Holeman*, 693 P.2d 89 (Wash. 1985), *State v. Morse*, 480 A.2d 183 (N.H. 1984), and *Scroggins v. State*, 633 S.W.2d 33 (Ark. 1982). The district court reviewed the cases identified by Elder and found there was no controlling Idaho or Ninth Circuit case law on the issue of "constructive entry." That being so, it concluded that the officers could not have violated Elder's clearly estab-

lished rights when the law was not clear as to when a constructive entry occurs, and the officers could reasonably have believed they could effectuate an arrest outside the door without violating any clearly established right.

On appeal, Elder argues that the law was clearly established that the officers were required to have an Idaho warrant prior to ordering him out of the house, because the facts constitute a constructive crossing of the threshold. Elder identifies the same cases as showing that the law was clearly established that the arrest constructively occurred inside rather than outside his house, as he did in the district court—*Holeman*, *Morse*, and *Scroggins*—and also relies on *Duncan v. Storie*, 869 F.2d 1100 (8th Cir.), *cert. denied*, 493 U.S. 852 (1989). *Duncan* post-dates the incident and is therefore not material; it does, however, cite to *United States v. Al-Azzawy*, 784 F.2d 890 (9th Cir. 1985), *cert. denied*, 476 U.S. 1144 (1986).

In *Al-Azzawy*, police surrounded the suspect's house and, with weapons drawn, ordered him to leave. When he emerged, he was taken into custody. We held that exigent circumstances justified the warrantless arrest. Before reaching this issue, however, we first addressed the question whether the arrest had taken place inside the suspect's house; if not, the issue of exigent circumstances would have been moot. We determined that, even though the suspect had exited the house and was physically seized outside, he was in fact "arrested inside his residence without a warrant." *Id.* at 893. In so concluding, we reaffirmed the rule that "it is the location of the arrested person, and not the arresting agents, that determines whether an arrest occurs within a home." *Id.* (quoting *United States v. Johnson*, 626 F.2d 753, 757 (9th Cir. 1980), *aff'd on other grounds*, 457 U.S. 537 (1982)). Since we reversed the district court "on the grounds that the warrantless arrest and search were justified by exigent circumstances," *id.* at 895, our conclusion as to where

the arrest took place may be regarded as dicta, unnecessary to this result.

We have no difficulty with the district court's decision on the record it was presented. No case Elder identified clearly established whether an arrest takes place inside or outside the home, when the suspect is inside but is summoned outside by law enforcement officers who have surrounded the premises.

We are, however, troubled by the possibility that *Al-Azzawy's* initial conclusion might have alerted a reasonable officer to the constitutional implications of putting a suspect under arrest after he had come outside his house pursuant to an order to exit. Despite the opportunity at oral argument and subsequent briefing, neither party has shed much light on whether *Al-Azzawy* requires us to reverse despite Elder's failure to rely on it.[1]

"[T]he determination of whether [a] right was so 'clearly established' as to alert a reasonable officer to its constitutional parameters" presents a "pure question[] of law." *Romero v. Kitsap County*, 931 F.2d 624, 627-28 (9th Cir. 1991); *see also Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (referring to the "essentially legal question" of qualified good faith immunity). At the same time, "[t]he plaintiff bears the burden of proof that the right allegedly violated was clearly established at the time of the alleged misconduct. If plaintiff carries this burden, then the officers must prove that their conduct was reasonable even though it might have violated constitutional standards." *Romero*, 931 F.2d at 627 (citations

[1] Elder's view is that "all cases are distinguishable." We assume he takes this position because of *Al-Azzawy*'s ultimate holding, that exigent circumstances justified the officers' conduct in that case. That holding ultimately cuts against Elder in this action, and may explain why he did not proffer *Al-Azzawy* in opposition to Holloway's motion.

omitted); *Maraziti v. First Interstate Bank*, 953 F.2d 520, 523 (9th Cir. 1992).

II

In § 1983 actions where qualified immunity is at issue, it has been the rule that the plaintiff bears the burden of showing that the fact-specific constitutional right allegedly violated was clearly established at the time of the incident since *Davis v. Scherer*, 468 U.S. 183 (1984), and *Bothke v. Fluor Eng'rs and Constructors, Inc.*, 739 F.2d 484 (9th Cir. 1984), following *Davis* in this circuit. In *Davis*, the Supreme Court held that "[a] plaintiff who seeks damages for violation of constitutional or statutory rights may overcome the defendant official's qualified immunity only by showing that those rights were clearly established at the time of the conduct at issue." 468 U.S. at 197.

Our court has reiterated the burden of proof rule a dozen times since *Bothke*,[2] but until now we have not been called upon to reconcile it with the equally well settled rule that the determination of whether the constitutional right was clearly established presents an issue of law. We believe that neither rule can be ignored, and hold that the plaintiff's burden in responding to a request for judgment based on qualified immunity is to identify the universe of statutory or decisional law from which the court can determine whether the right allegedly violated

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[2] *Maraziti*, 953 F.2d at 523; *Romero*, 931 F.2d at 627; *Bryant v. United States Treasury Dep't*, 903 F.2d 717 (9th Cir. 1990), *rev'd*, *Hunter v. Bryant*, 112 S. Ct. 534 (1991); *DiMartini v. Ferrin*, 889 F.2d 922, 927-29 (9th Cir. 1989), *amended on other grounds*, 906 F.2d 465 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 2796 (1991); *Baker v. Racansky*, 887 F.2d 183, 186 (9th Cir. 1989); *Tribble v. Gardner*, 860 F.2d 321 (9th Cir. 1988), *cert. denied*, 490 U.S. 1075 (1989); *Bothke v. Fluor Eng'rs & Constructors, Inc.*, 834 F.2d 804, 808 (9th Cir. 1987); *Tomer v. Gates*, 811 F.2d 1240 (9th Cir. 1987); *Backlund v. Barnhart*, 778 F.2d 1386, 1389-90 (9th Cir. 1985); *Fendler v. United States Parole Comm'n*, 774 F.2d 975, 980 (9th Cir. 1985).

was clearly established. The district court's determination of whether that universe of authority clearly established the law so as to alert a reasonable officer to the constitutional parameters of the right allegedly violated is an issue of law, as to which our review is de novo.

A

Under the rule of *Davis v. Scherer*, a defendant is presumed to be immune from damages unless the plaintiff shows that the right allegedly violated was clearly established at the time of the conduct at issue. 468 U.S. at 197. Thus, Holloway had qualified immunity unless Elder overcame it by "showing" that the right not to have his house constructively entered was clearly established (or that there are triable issues of fact that must be resolved before a determination can be made whether, as to those specific facts, the law was clearly established). If the plaintiff is not expected to make any "showing" except as to what happened factually, leaving it to the court to come up with the relevant universe of authority from which to find whether the law was clearly established, the *Davis* rule would be flipped on its head.

Expecting the plaintiff to identify all potentially relevant authorities that bear on the court's determination of whether the law was clearly established comports with the Supreme Court's recent approach to qualified immunity. From *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), through *Davis* and *Anderson*, 483 U.S. at 635, to *Hunter v. Bryant*, 112 S. Ct. 534 (1991), the Court has made qualified immunity the presumptive norm, which can be overcome if the plaintiff shows that the contours of a fact-specific right are so clear that a reasonable official would understand that what he is doing violates that right. Requiring the plaintiff to identify the universe of authority that is relevant to the fact-specific right allegedly violated follows naturally from this direction.

While most of our qualified immunity opinions make no mention of who came up with the relevant authority, we have in practice looked to the cases identified by the plaintiff. On several occasions, after stating that the plaintiff bears the burden of proof, we have explicitly indicated which cases the plaintiff identifies, and have discussed only those cases in resolving the appeal. *See, e.g., Romero*, 931 F.2d at 629 (plaintiffs maintain that despite federal law, decisions of state courts demonstrate law was clearly established; they cite particular case, which court finds did not adjudicate right at issue); *Baker v. Racansky*, 887 F.2d 183, 188 (9th Cir. 1989) (plaintiffs rely on four cases which they assert clearly established right to hearing or warrant); *Backlund v. Barnhart*, 778 F.2d 1386, 1389 (9th Cir. 1985) (plaintiffs must show they had clearly established right to exercise religious beliefs about punishment on foster care child; "[t]hey fail to cite any pertinent authority on this issue").[3] At least two other circuits have indicated that a plaintiff, in order to carry his burden of proving that the law was clearly established (and thus to avoid summary judgment in favor of the defendant), must specifically identify the clearly established law. *See Pueblo Neighborhood Health Ctrs., Inc. v. Losavio*, 847 F.2d 642, 646 (10th Cir. 1988) (burden is on plaintiff to identify clearly established law; if plaintiff fails to carry

[3] We simply make explicit in this case what was implicit in *Backlund*, where we said:

> We do not hold that Section 1983 plaintiffs must always find a case on point in their favor to show that their rights were clearly established. Certainly they need not always produce binding precedent. *Capoeman v. Reed*, 754 F.2d 1512, 1514-15 (9th Cir. 1985). There may be cases of conduct so egregious that any reasonable person would have recognized a constitutional violation. The Backlunds have failed to show that this was such a case. Indeed, they have failed to show a violation of any constitutional right, clearly established or not.

Backlund, 778 F.2d at 1390 (footnote omitted).

this burden, defendant prevails); *see also, e.g., Upton v. Thompson*, 930 F.2d 1209, 1212 (7th Cir. 1991) ("To prove the presence of a clearly established constitutional right, the plaintiff must point to 'closely analogous cases' decided prior to the defendants' challenged actions."), *cert. denied*, 112 S. Ct. 1262 (1992).

We therefore hold that in opposing an official's request for judgment based on qualified immunity, the plaintiff's burden includes identifying the universe of relevant statutory or decisional law from which the court can determine whether the right allegedly violated was clearly established. Imposing the burden of proving that the right was clearly established means that a § 1983 plaintiff, confronted with a challenge on grounds of qualified immunity, must show that the particular facts of his case support a claim of clearly established right, and he loses if he does not come forward with statutory or decisional law on which the court can find that the constitutional right allegedly violated was clearly established. *See Backlund*, 778 F.2d at 1389.

B

Although qualified immunity is an "essentially legal question," *Mitchell v. Forsyth*, 472 U.S. at 526, neither the trial court nor the court of appeals decides what the law *is*, but instead the question is whether the law with respect to a fact-specific set of circumstances *was* "so 'clearly established' as to alert a reasonable officer to its constitutional parameters." *Romero*, 931 F.2d at 627. Whether a right was clearly established requires consideration of legal facts, that is, it requires a balancing by the judge of such things as whether any court has held that a particular constitutional right exists or that conduct similar to that of the officers in the case at hand violates that constitutional right, the number of times the particular right has been recognized and under what circumstances, whether the alleged constitutional right was ap-

parent from the cases even if it had not been expressly recognized, how clear the holdings were, which courts made the decisions, and whether in light of those decisions, a reasonable officer could have believed his conduct to be lawful. The nature of this determination, in light of the burden of proof imposed on the plaintiff to show that the law was clearly established, distinguishes the legal inquiry in qualified immunity cases from both the ordinary civil case and others where constitutional issues are presented. These differences lead us to conclude that appellate review of the resulting determination is appropriately limited to whether the district court erred in concluding that the plaintiff failed to meet his burden on the record of authorities the plaintiff produced.

Whereas normally, a district court has to get an issue of law right, and it does not matter which party presents which authorities (or whether the court uncovers them itself) because the court's decision on a purely legal issue is either right or wrong "as a matter of law," imposing the burden of proving that the law was clearly established on the plaintiff—as we do in the unique context of qualified immunity—is without meaning unless the plaintiff has an obligation to produce the legal facts from which the court can determine what the state of the law was at the point of time in the past when the incident occurred. In the ordinary case, the party asserting a claim or defense may have the practical burden of convincing a judge that the law favors his position in the present, but that differs from a legal burden of showing how clearly the law was established at a given point in the past. There may, indeed, be no law that bears on the issue at all, but in the ordinary case that does not mean the proponent will lose. It does, however, mean that the plaintiff *must* lose in the context of qualified immunity unless the officers' conduct was "so egregious that any reasonable person would have recognized a constitutional violation." *Backlund*, 778 F.2d at 1390.

Similarly, in other cases where constitutional issues are adjudicated, courts declare what the law is (no matter how fuzzy the precedents), but that is a different obligation from determining what the law with respect to an alleged constitutional right was, and how clear it was. When, for example, the issue on a motion to suppress is whether police officers violated a suspect's constitutional rights by coercing him into a confession, there is no question that the district court must divine and apply the law correctly, no matter what cases are cited by the parties. The court of appeals has a correlative obligation to correct error when it occurs. But that is not the task when addressing whether government officials are entitled to qualified immunity from damages. The difference has long been recognized, for, as we stated in *Backlund*, "qualified immunity shields an official from liability for damages only, not from a finding that he violated constitutional rights." 778 F.2d at 1389 n.3 (citing *Davis*, 468 U.S. at 192-93).

Courts of appeals do not invariably reverse in a civil case whenever a district court gets the law wrong on an issue of law, even if the consequence is that the result would otherwise be different. We do when the legal question is whether a claim for relief is stated, or whether a party is entitled to judgment as a matter of law. We do not when the question is whether instructions accurately state the law, and the party claiming error did not object, *see, e.g., Hammer v. Gross*, 932 F.2d 842, 847-48 (9th Cir.) (en banc), *cert. denied*, 112 S. Ct. 582 (1991); *Benigni v. City of Hemet*, 879 F.2d 473, 477 (9th Cir. 1988); *Martinelli v. City of Beaumont*, 820 F.2d 1491, 1493-94 (9th Cir. 1987), or invited the error about which he complains on appeal. *See, e.g., Benigni*, 879 F.2d at 477.[4]

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[4] We also, of course, do not consider legal issues not raised or ruled upon in the district court. Examples include those matters

The determination of whether a specific right was clearly established is closer to the latter kind of "issue of law" than the former. In an adversary system where the plaintiff has the burden of showing that a specific right was clearly established in the law, if the court "gets it wrong" because the universe of cases proffered by the plaintiff in support of his claim that the right was clearly established turns out to be less than all of the potentially relevant legal facts, the plaintiff has invited whatever error occurs.

Defining the plaintiff's burden to include identification of relevant authority in the unique context of qualified immunity should have no unsettling effect on the orderly

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that can be urged by way of a Rule 12 motion that are waived unless made with the answer, *see, e.g.*, Fed. R. Civ. P. 12(h)(1) (defenses of lack of personal jurisdiction, improper venue, insufficiency of process, and insufficiency of service of process waived if omitted from pre-answer motion, if any, or answer); *Benny v. Pipes*, 799 F.2d 489, 492 (9th Cir. 1986) (A "general appearance or responsive pleading by a defendant that fails to dispute personal jurisdiction will waive any defect in service or personal jurisdiction."), *amended on other grounds*, 807 F.2d 1514 (9th Cir.), *cert. denied*, 484 U.S. 870 (1987); *Chilicky v. Schweiker*, 796 F.2d 1131, 1135-36 (9th Cir. 1986) (if party files pre-answer motion but fails to raise defense of lack of personal jurisdiction in that motion, defense is waived); *rev'd on other grounds*, 487 U.S. 412 (1988); and issues that could have been joined by a motion for directed verdict, but cannot be pressed on appeal unless that motion is made, *see, e.g., Gilchrist v. Jim Slemons Imports, Inc.*, 803 F.2d 1488, 1493 (9th Cir. 1986) (sufficiency of evidence not reviewable on appeal unless motion for directed verdict was made in trial court); *United States v. 33.5 Acres of Land*, 789 F.2d 1396, 1400 (9th Cir. 1986) (same, but noting limited exception for plain error resulting in manifest miscarriage of justice). We never consider *facts* not presented to the district court. *United States v. Elias*, 921 F.2d 870, 874 (9th Cir. 1990). And, the relevant record on review of summary judgments is the record as it existed at the time the motion was considered. *Harkins Amusement Enters., Inc. v. General Cinema Corp.*, 850 F.2d 477, 482 (9th Cir. 1988), *cert. denied*, 488 U.S. 1019 (1989).

development of constitutional law. So far as the particular case is concerned, the district court may still find that the plaintiff's constitutional rights were violated even though at the time of the incident, the right was not so clearly established that an official should have to respond in damages for his conduct. *Backlund*, 778 F.2d at 1389 n.3 (citing *Davis*, 468 U.S. at 192-93). By the same token, an appellate decision that the district court did not err on the record before it in determining that a right was not clearly established based on the universe of authorities produced by the plaintiff is precedential only on whether the specific right allegedly violated was clearly established at a particular point in time, *see Baker*, 887 F.2d at 187 (post-incident cases which considered whether law governing child abuse investigations was clearly established in 1986, at time of incident in question, are relevant persuasive authority on this issue); it has no precedential effect on whether such a constitutional right exists or was violated, or as to a subsequent case where the record is different.

Accordingly, we shall review the district court's determination that a § 1983 plaintiff has (or has not) met the burden of showing that the law was clearly established for purposes of qualified immunity for whether its conclusion was correct based on the legal facts identified by plaintiff.

III

Our holding does not mean that it is inappropriate for a district court to come up with relevant law on its own, anymore than it is inappropriate for a district judge to ask questions and thereby elicit evidence on his own. However, the district court has no obligation to do either in the unique context of qualified immunity. Where the plaintiff bears the burden of proof that the law was clearly established, as the plaintiff does in overcoming a request for judgment on the ground of qualified immunity, and

based on the record adduced fails to meet it, we hold only that the district court does not commit reversible error by failing to fill in the holes.

We are satisfied that no injustice results to Elder. First, the unproffered authority, *Al-Azzawy*, is not entirely advantageous. Because our ultimate holding in that case was expressly grounded on the conclusion that exigent circumstances justified the suspect's arrest and the subsequent warrantless search, 784 F.2d at 895, our initial conclusion that the arrest had taken place "inside" the house was unnecessary dicta. Given our adversary system, we are unwilling to say that Elder should be stuck with our take on a case that his counsel thinks is distinguishable, but rather believe that when the plaintiff has the burden of adducing the legal facts necessary to prove that the law was clearly established, the record upon which that determination is made is his call rather than ours. Second, assuming that Elder's failure to proffer *Al-Azzawy* was inadvertent, and the district judge did not find it either, we are hard-pressed to say that the law was so clearly established that a reasonable law enforcement officer in Holloway's shoes would understand that what he was doing violated a constitutional right. *See Ward v. County of San Diego*, 791 F.2d 1329, 1332 (9th Cir. 1986) (the court does not "require of most government officials the kind of legal scholarship normally associated with law professors and academicians"), *cert. denied*, 483 U.S. 1020 (1987).

For these reasons we conclude that the plaintiff in a § 1983 action, who bears the burden of showing that the constitutional right allegedly violated was clearly established at the time of the alleged misconduct, must identify the body of law which proves that the right was so clearly established that a reasonable officer would be alerted to its constitutional parameters. If the universe of statutory or decisional law proffered by the plaintiff does not show

that the right allegedly violated was clearly established at the time of the incident, the district court does not commit reversible error by considering only the legal facts presented and determining, correctly, that based on those legal facts the plaintiff has not shown that the contours of the right were clear.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

(Caption Omitted in Printing)

Filed January 27, 1993

Before: J. Clifford Wallace, Chief Judge, Procter Hug, Jr. and Pamela Ann Rymer, Circuit Judges.

Dissents by Judges Kozinski and Reinhardt

ORDER AND DISSENTS

ORDER

The panel has voted to deny appellants' petition for rehearing and to reject the suggestion for rehearing en banc.

The full court was advised of the suggestion for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

Judges Reinhardt and Kozinski dissent from the failure of the court to rehear the case en banc.

DISSENTS

KOZINSKI, Circuit Judge, with whom Circuit Judges PREGERSON, NORRIS, REINHARDT and TROTT join, dissenting from the order rejecting the suggestion for rehearing en banc.

It is not every day that one witnesses the birth of a totally new legal doctrine. And with good reason. Established legal principles, honed over decades—sometimes centuries—generally have much experience and wisdom behind them. Monumental change should be made only for compelling reasons and after careful consideration of all foreseeable consequences.

Despite the opinion's modest language, the panel here has taken quite an extraordinary step. Simply stated, the panel has held that in raising a pure question of law a party may rely on appeal only on those authorities which it cited to the district court. A court of appeals, in turn, must ignore its own (and the Supreme Court's) controlling case law if it was not cited to the court below. The panel reaches this result by adding a new term to the argot of jurisprudence: "legal facts." The term is as self-contradictory and nonsensical as the doctrine it supports. Because we can ill afford to maintain this precedent as the law of this circuit, I respectfully dissent from the court's refusal to take this case en banc.

I

The underlying facts are simple: Defendants, all police officers, surrounded Charles Elder's house and ordered him to come out. He did come out and was promptly arrested in front of his house. Elder sued under 42 U.S.C. § 1983, alleging the police violated his Fourth Amendment right to not be arrested in his home without a valid warrant. Defendants moved for summary judgment claiming qualified immunity. To overcome the immunity defense, plaintiff cited a variety of cases to demonstrate that the specific Fourth Amendment right he sued on was clearly established. None of the cases was directly on point, and the district court granted defendants' motion.

Unknown to the parties and the district court was *United States v. Al-Azzawy*, 784 F.2d 890 (9th Cir. 1985), *cert. denied*, 476 U.S. 1144 (1986), which showed that the "principle [on which plaintiff rested his case] was clearly established at the time of Elder's arrest." *Elder v. Holloway*, 951 F.2d 1112, 1114 (9th Cir. 1991) (previous version of this opinion).[1]

Whether the right was clearly established at the time of the incident, the majority recognizes, is a "pure question of law." *Elder v. Holloway*, 975 F.2d 1388, 1392 (9th Cir. 1992) (quoting *Romero v. Kitsap County*, 931 F.2d 624, 627-28 (9th Cir. 1991)). It is, of course, well understood that questions of law are reviewed by us de novo, giving no deference to the ruling of the district court. *Pierce v. Underwood*, 487 U.S. 552, 557 (1988); *Bose Corp. v. Consumers Union*, 466 U.S. 485, 501 (1984); *United States v. Silverman*, 861 F.2d 571, 576 (9th Cir. 1988) ("Under the de novo standard of review, we do not defer to the lower court's ruling but freely consider the matter anew, as if no decision had been rendered below.").

The reason for de novo review of legal questions is obvious enough: We are in a better position than the

[1] The panel omits this statement from the more recent version of its opinion, but it does nothing to controvert it. This is quite understandable. *Al-Azzawy* is on all fours with this case; our statement that "it is the locati n of the arrested person, and not the arresting agents, that determines whether an arrest occurs within a home," *Al-Azzawy*, 784 F.2d at 893, was clear, and it applies directly to the claim of qualified immunity raised by the defendants here. Its applicability is undiminished by the panel's suggestion that it "may be regarded as dicta." *Elder*, 975 F.2d at 1391. In fact, the majority's reliance on its newly invented doctrine can only be understood as recognizing that *Al-Azzawy* does make a difference. After all, if *Al-Azzawy* did not change the legal landscape enough to defeat a claim of qualified immunity, it would have been far simpler to dispose of the case on that basis.

district court to resolve legal questions. We "are not encumbered, as are trial judges, by the vital, but time-consuming, process of hearing evidence." *United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824 (1984). We see many legal issues repeatedly, giving us a greater familiarity with the subject matter. We also have the advantage of sitting in panels where we can deliberate about legal issues. Even the en banc process (which failed us here) lets us talk to each other about issues that the district court must decide alone.

When it comes to facts, however, the district court has an institutional advantage. It can observe witnesses, hear their testimony, and see and touch the physical evidence. Our review of questions of fact is therefore very limited. This leaves resolving questions of law—if necessary, by writing opinions that refine, clarify and develop existing legal doctrines—as our principal mission.

Given these defined areas of responsibility, the panel's holding is a true anomaly. According to the panel, because the plaintiff in a qualified immunity case has the burden of showing the defendant violated clearly established law, the relevant law on that point becomes a fact —a legal fact—which the plaintiff must prove up in the district court. But there is nothing about qualified immunity that requires or permits treating the law as fact. Facts by their nature are case specific. They must be proven through witnesses or documentary evidence; the proof is subject to skeptical review by the trier of fact who may not accept all that is put in front of him. Law is external to any particular case; it is not subject to evaluation by the trier of fact; it can be raised for the first time on appeal because it need not—cannot—be established by use of percipient witnesses or documentary evidence.

Every issue in every case turns on both fact and law; facts outside a legal framework are as irrelevant as abstract legal principles. When we say, for example, that the plaintiff must prove certain facts at trial, we mean he must first establish what the law is and then conform his proof to the applicable legal standard.[2] If the plaintiff misunderstands the law, he may well prove up the wrong set of facts. The failure to get the law right in such a case may then be fatal, not because law is fact, but because a party can't supplement the record on appeal once it discovers that it missed the legal target in the district court. It is quite another matter to say, as the panel does, that even though the facts proved in the district court would be sufficient to defeat a claim of qualified immunity under the existing law, the party might lose because it forgot to cite the correct case below.

The panel's misguided ruling shifts the focus of the qualified immunity inquiry from the clarity of the law actually violated by the defendants to the clarity of the law as presented by the plaintiff to the district court. Thus, under the panel's opinion, a government official's conduct is not evaluated under the standard announced by the Supreme Court—*the clearly established law* at the time the official acted—but on the basis of what case law the plaintiff's lawyer managed to dredge up and cite below. This is a drastic departure from the way questions of law are decided and reviewed in our system, where the adversaries present their versions of the law to the court and the court renders its determination after making an independent assessment of what the law is.

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[2] If it turns out that the plaintiff misunderstands the law and, as a consequence, misleads the district court, we may well limit the scope of our judicial review. *See* pp. 592-94 *infra*. But we most assuredly do not say that the plaintiff has failed to meet his burden of proof because he did not cite a particular case to the district court; we certainly do not say that the appeal *must* be determined as if no other law existed than what was cited to the district court.

II

We are told that the blind man, when handed the elephant's tail, concluded that the creature looked like a rope. So does the panel err in building a whole theory of qualified immunity law on a paragraph dangling at the end of *Davis v. Scherer*, 468 U.S. 183 (1984). There the Court stated: "A plaintiff who seeks damages for violation of constitutional or statutory rights may overcome the defendant official's qualified immunity only *by showing* that those rights were clearly established at the time of the conduct at issue." *Id.* at 197 (emphasis added). The panel reads the phrase "by showing" as setting a requirement that the clearly established law be proved as one typically proves fact—the way one would show that the light was red or that the banana peel was dark and gritty. But that is not a plausible reading of the Supreme Court's language. Because the Court has elsewhere made it clear that whether a right is clearly established is a question of law, the term "showing" must be construed as it applies to legal issues. The way a party demonstrates (or shows) that it should prevail in its legal argument is by citation and argument (which are judged only after a court has made an independent examination of the law), not by testimony and documentary proof.

Had the Court meant to adopt the rule that legal issues in qualified immunity cases are to be proved as facts, it would surely have used clearer language to explain what it was doing. It would not have adopted a major change like this merely by using the word "showing" and then hoping the lower courts would notice its word choice and make the connection—a connection no court actually made for eight years, until this panel suddenly perceived it. The Court would have also provided some rationale or explanation for adopting such a startling new rule. It certainly would not have adopted it without any discussion at all.

A. To understand the significance of the phrase on which the panel relies we must consider it in the context of both the entire *Davis* opinion and the legal backdrop against which it was placed. I start by noting that *Davis* never purported to alter the objective test for qualified immunity first announced in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). *Davis* applied the test unchanged, quoting it in full before it went through its qualified immunity analysis. *See Davis*, 468 U.S. at 191 (quoting *Harlow*, 457 U.S. at 818). This express restatement of *Harlow* shows that the concluding paragraph in *Davis*—a brief epilogue restating the qualified immunity test—meant simply to reassert *Harlow*, not alter it.[3]

Harlow held that government officials "are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. at 818. This "qualified immunity defense depends upon the 'objective reasonableness of [the defendant official's] conduct as measured by reference to clearly established law.' No other circumstances are relevant . . . ." *Davis*, 468 U.S. at 191 (citation omitted) (quoting *Harlow*, 457 U.S. at 818). Two aspects of the *Harlow* test call into question the panel's reading of *Davis*.

First, *Harlow* says nothing about the plaintiff having to prove up the law; in fact, it clearly intends that the court make an independent determination of the law: "On summary judgment, the *judge appropriately may determine*, not only the currently applicable law, but *whether the law was clearly established* at the time an action occurred." 457 U.S. at 818 (emphasis added). Thus, *Harlow* gave the court the responsibility to determine whether the law was clearly established. Neither

[3] In fact, *Davis* clarified *Harlow*; I take that up below. *See* pp. 586-87 *infra*.

Harlow nor *Davis* ever indicated that the plaintiff is obligated to prove up the law or that he waives any authorities not presented to the district court.

Second, the panel's rule is inconsistent with the rationale underlying the *Harlow* test. *Harlow* shifted the inquiry in qualified immunity cases from the subjective good faith of the government officials to the objective reasonableness of their conduct in light of clearly established law. *See id.* at 816-17. The Court settled on this objective test because "[t]he public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objective legal reasonableness of an official's acts." *Id.* at 819. The line *Harlow* drew was clear: "Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action." *Id.* at 819. Essential to this inquiry is that the official's conduct be judged against an objective standard—the law as it actually was, not as the official thought it was, or as the plaintiff proves it to be. *Harlow* doesn't say that "officials should be made to hesitate" when plaintiff can cite a case that says they should. Rather, the deterrence is supposed to operate whenever officials *in fact* transgress the actual clear boundaries of the law. *Davis* did nothing to move the inquiry off this fixed reference point.

In misreading *Davis*, the panel bypasses a far more natural interpretation of the relevant language—an interpretation based on the analysis in the body of the opinion. The precise question faced in *Davis*—something the panel never mentions—was whether an immunity defense could be defeated on the ground that the official violated *state* law. The Court answered this question in the negative, but it didn't stop there. *Davis* went on to hold that the violation of clearly established law relevant to the im-

munity determination must be the same violation as that on which the plaintiff rests his section 1983 claim. In other words, a plaintiff suing for violation of a specific Fourth Amendment right may only defeat the immunity claim if that very Fourth Amendment right was the clearly established one.

With this holding in mind, the meaning of the passage that confuses the panel becomes clear. Consider again the language: "A plaintiff who seeks damages for violation of constitutional or statutory rights may overcome the defendant official's qualified immunity only by showing that *those rights* were clearly established at the time of the conduct at issue." 468 U.S. at 197 (emphasis added). The Court is merely restating its holding by emphasizing that to defeat a qualified immunity claim there must be an identity between the sued-on right and the clearly established right. The language was meant to prevent future plaintiffs from trying, as Scherer did, to sue on one right and to overcome the immunity by showing that some other rights were clearly established. This was the whole point of *Davis*, and the language the panel relies on here merely summarizes this ruling. It is normal practice to restate holdings in conclusions; it is far from normal for a conclusion to make a substantive legal change that is not even considered in the body of the opinion.

B. That *Davis* was not the watershed opinion the panel here reads it to be is evident from the Supreme Court's subsequent qualified immunity decisions. None of these decisions even hint at a requirement that the plaintiff must prove up the law by pleading legal facts. To the contrary, the Court has continued to draw clear distinctions between questions of law and questions of fact.

In *Mitchell v. Forsyth*, 472 U.S. 511, 524-30 (1985), the Court dissected a qualified immunity claim to determine whether a denial of immunity was an appealable order under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). The Court considered the nature of an immunity claim in applying the *Cohen* requirement that a claim of right must be "separable from, and collateral to, rights asserted" in the underlying action in order to be appealable in an interlocutory appeal. 472 U.S. at 527. In holding that an immunity determination was a separate right, the Supreme Court explained the role of an appellate court in reviewing a qualified immunity claim:

> An appellate court reviewing the denial of defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts, nor even decide whether the plaintiff's allegations actually state a claim. *All it need determine is a question of law: whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions* . . . . To be sure, the resolution of these legal issues will entail *consideration of the factual allegations that make up the plaintiff's claim for relief* . . . . [T]he Court has recognized that a question of immunity is separate from the merits of the underlying action for purposes of the *Cohen* test even though a reviewing court *must consider the plaintiff's factual allegations in resolving the immunity issue.*

472 U.S. at 528-29 (emphasis added). *Mitchell* makes clear that the court considers "the factual allegations that make up the plaintiff's claim," not the factual allegations plus the limited "universe of statutory or decisional law" presented to the district court. *See* 975 F.2d at 1392. There is no hint in *Mitchell's* formula that a reviewing court should analyze anything other than the allegations of official misconduct—*factual* allegations—presented to the district court when determining whether the conduct violated clearly established law.

In *Siegert v. Gilley*, 111 S. Ct. 1789 (1991), despite a three-way split on the merits, the Justices agreed on one point: It was the *facts* Siegert alleged, not any particular cases he happened to cite—or not cite—in support of his claim, that mattered for purposes of deciding the qualified immunity question. The Justices seemed perfectly willing to use their own resources to determine and explain what the law was. The majority wrote: "The *facts alleged* by Siegert cannot, in the light of our decision in *Paul v. Davis* be held to state a claim for denial of a constitutional right." *Id.* at 1794 (emphasis added). Focusing on the malice element requisite to Siegert's constitutional claim, Justice Kennedy said: "Upon the assertion of a qualified immunity defense the plaintiff must put forward specific, nonconclusory *factual allegations* which establish malice, or face dismissal. . . . In my view petitioner did not meet the burden of *alleging facts* from which malice could be inferred by other than the most conclusory allegations." *Id.* at 1795 (emphasis added). The dissent said something very similar: "The majority contends that Siegert has not alleged the violation of any 'right,' 'clearly established' or otherwise. In my view, there can be no doubt that *the conduct alleged* deprived Siegert of a protected liberty interest and that this right was clearly established at the time Gilley wrote his letter. Siegert's claim, therefore should surmount Gilley's assertion of qualified immunity." *Id.* at 1797 (emphasis added) (Marshall, J., dissenting). Not one of the opinions purported to limit its analysis to the cases cited by Siegert to the district court. The phrase "legal facts" appears nowhere in the opinion.

Other post-*Davis* Supreme Court qualified immunity cases follow the same pattern. *See, e.g., Anderson v. Creighton*, 483 U.S. 635 (1987); *Hunter v. Bryant*, 112 S. Ct. 534 (1991). In none of the Court's qualified immunity analyses is there support for the panel's rule that a section 1983 (or *Bivens*) plaintiff loses on appeal if,

though his factual allegations show a violation of clearly established law, he did not cite the right case to the district court to prove that the law was clearly established. Of course, in trying to persuade the court, a plaintiff will want to cite precedents that support his claim that the law the defendant violated was clear. But this doesn't mean the district court (or we on appeal) "has no obligation," *see* 975 F.2d at 1396, to determine on its own "whether [the] law was clearly established at the time [the] action occurred," *Harlow*, 457 U.S. at 818. The court's job is to determine the rights of the parties, not to grade motion papers.

III

In an effort to bring its novel theory into the doctrinal mainstream, the panel points to a variety of rules and practices that, it argues, provide support for its approach. None, in fact, do so.

A. The panel offers this revelation: "While most of our qualified immunity opinions make no mention of who came up with the relevant authority, we have in practice looked to the cases cited by the plaintiff." 975 F.2d at 1393. Of course we have. Much of the time the plaintiff does cite all the relevant cases, so referring to the "cases plaintiff cites" is a useful means of pinpointing a successful argument or rejecting an unsuccessful one. Often we refer to the cases cited by the parties to fulfill our duty to render reasoned decisions that assure the litigants their claims have been given careful consideration. Referring to "the cases the plaintiff cites" is a turn of phrase, not a legal doctrine.

Never have we felt limited to considering only those cases plaintiff cites. *Backlund v. Barnhart*, 778 F.2d 1386 (9th Cir. 1985)—the panel's own showpiece precedent—is a good example: In *Backlund*, the court did note that plaintiffs "fail to cite any pertinent authority" to establish a violated right, *id.* at 1389, but it didn't end

its analysis there. Rather, it went on to say: "Nor can [plaintiff's cite any relevant authority], for the following reasons." *Id.* At that point, the court launched into a full-scale analysis of the relevant point of law, without ever hinting that its inquiry was somehow limited by the authorities cited by the plaintiff. Had the *Backlund* court felt itself bound by the cases cited by the plaintiff, all this discussion would have been unnecessary.

Many other qualified immunity cases explicitly go beyond the "universe of authorities" cited by the plaintiff. *See, e.g., Mendoza v. Blodgett*, 960 F.2d 1425, 1431 (9th Cir. 1992) ("No case . . . has been cited to us, *nor have we found any* . . . .") (emphasis added), *petitions for cert. filed*, 61 U.S.L.W. 3303 (Aug. 28, 1992) (No. 92-579) and —— U.S.L.W. —— (Nov. 2, 1992) (No. 92-6560); *Maraziti v. First Interstate Bank of California*, 953 F.2d 520, 523 (9th Cir. 1992) ("Maraziti cites no cases, *and we have found none* . . . .") (emphasis added); *Alexander v. Perrill*, 916 F.2d 1392, 1398 (9th Cir. 1990) ("a similar issue [was] previously litigated and decided in [the plaintiff's] favor—*a case which inexplicably both parties failed to cite in their briefs*") (emphasis added). The careful effort in these cases to seek out and consider authorities not cited by the parties is entirely consistent with what I understand to be our role as judges. The panel's ostrich-like insistence that authorities not cited by the plaintiff in the district court may not be considered on appeal is at odds with this body of case law.

B. The panel also cites a variety of rules which penalize a party for failing to raise a legal issue before the district court. 975 F.2d at 1394-95 & n.4. But none of these is actually analogous; none justifies the panel's doctrinal leap.

The panel's principal analogy is to the rule that we will not normally reverse because of an incorrect jury instruction where the party claiming error did not object. But the

Federal Rules of Civil Procedure expressly deal with the question of how jury instruction may be reviewed on appeal; "No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." Fed. R. Civ. Proc. 51. That the drafter felt it necessary to have a special rule governing this issue suggests that this is the exception from the normal practice. If one could analogize jury instructions to qualified immunity determinations, the analogy would cut against the panel.

But the analogy just isn't there. The purpose of Rule 51 is to require timely objections to instructions so the trial judge has a chance to change them before the jury retires to consider its verdict. Without it, a party who fails to object to a defective instruction would get two bites at the apple. If the party gets a favorable verdict despite the bad instruction, it wins; if the verdict is unfavorable, the party still has a shot at a new trial by appealing on the ground that the instruction was defective. Moreover, the cost of an appellate reversal based on faulty jury instructions—a completely new trial—is obviously very high. With motions for summary judgment based on qualified immunity, on the other hand, there is no incentive to sandbag by failing to point out favorable cases, and the costs of a reversal on an appeal from summary judgment are relatively small.

Equally helpful are the other rules the panel cites as supposed analogies. 975 F.2d at 1395 n.4. Each deals with a particular eddy away from the procedural mainstream; none supports the rule adopted here. Rule 12(h)(1), for example, is a procedural tripwire designed to ensure that certain key issues are raised at the very earliest stage of the litigation. Like Rule 51, it embodies an exception, and suggests, if anything, that the opposite is the general rule. In any event, the waiver set up by this

rule is limited: It applies to certain, largely factual, defenses each of which is listed within the rule itself. Anyone who files an answer and does not list one of these defenses can fairly be deemed to have waived it; it is a far different matter to say that a plaintiff waives every case in F.2d and the U.S. Reports if he does not mention it in an opposition to a summary judgment motion. The remaining three rules—issues not raised by motion for directed verdict cannot be raised on appeal; facts (factual facts, not legal facts) not presented to the district court cannot be raised on appeal; and review of summary judgment is based on the record as it existed at the time the motion was considered—all deal with facts, which are within the peculiar competence of the district courts.

For reasons discussed above, *see* pp. 582-84 *supra*, there is simply no analogizing questions of law to questions of fact. Calling it legal fact simply can't by some peculiar alchemy, turn law into fact. Despite several strained attempts, the panel can find no solid analogy that supports a general rule of waiver of a question of law. This should be an important clue that what we have here is a bold departure from sound and established practice.

IV

The panel's novel rule will serve no one well. Ordinarily, the correct legal result does justice between the parties. By requiring us to ignore the controlling legal precedents and to affirm incorrect legal results, the panel's opinion may require us to affirm many unfair outcomes. The chaotic effects of the panel's rule will not be visited solely on plaintiffs. The government frequently cites cases which run against the general weight of authority in order to show that law which appears to be clearly established is actually muddy. Under *Elder*, if the government fails to cite such a case to the district court, the district court would presumably be free to ignore it, and we would be powerless to reverse the unjust imposition of liability on a government officer.

The panel's ruling also puts attorneys in an extremely awkward position. Under established ethical principles, counsel is required to cite to the district court all binding authorities, not only the favorable ones. Model Rules of Professional Conduct, Rule 3.3(a)(3); Model Code of Professional Responsibility, DR 7-106(B)(1). The same is not true as to facts: A lawyer need not introduce evidence that will defeat his client's claim; it may well be malpractice to do so. But what is a lawyer to do with legal facts? If the majority opinion is read literally, it would seem counsel would have the right—or even the duty—to keep to himself any case law (i.e., any legal facts) which help the other side. Encouraging such fraud on our district courts will neither make the job of district judges easier nor heighten the level of professional ethics among lawyers.

Finally, the panel's ruling will make it nearly impossible for us to develop a workable body of case law dealing with qualified immunity. Under the panel's opinion, decisions on qualified immunity issues merely represent factual findings based on the "record of authorities" presented to the district court. 975 F.2d at 1394. Every qualified immunity decision will be limited to its particular "facts," a term now defined to include the cited cases. Even if we were to begin the peculiar practice of including in our opinions a list of all the precedents cited to the district court, a given decision would only bind panels reviewing cases in which an identical list of authorities was presented below. Our decisions will no longer say what the clearly established law is, but only whether certain cited cases are sufficient, standing alone, to clearly establish the law. The panel opinion would therefore make it exceedingly difficult, if not impossible, to develop a jurisprudence of what constitutes "clearly established law," and would thereby "Balkaniz[e] the rule of qualified immunity" law—exactly what the Supreme Court wants to avoid. *Anderson v. Creighton*, 483 U.S. 635, 646 (1987).

V

The panel's approach, wrong though it be, does have some intuitive appeal. After all, doesn't fairness to the district judge require that we view the case as he did? Who among us has not felt somewhat betrayed when we were reversed based on an argument not fairly presented to us? "Ah," we may have thought, "had they put the matter *that* way, I could well have avoided the error."

But the judicial process isn't about fairness to judges; it's about fairness to the parties. While we often speak in terms of "fairly" presenting a matter to the district court, *see, e.g., Royal Printing Co. v. Kimberly-Clark Corp.*, 621 F.2d 323, 328 n.9 (9th Cir. 1980), we do not mean that the court is somehow disadvantaged because a matter was not fairly presented to it. Properly phrased, the question is: Was the matter presented to the district court in a manner fair to the opposing side?

When the question not raised below is factual in nature —which usually means, among other things, that it is peculiarly within the province of one of the parties—we generally say it is not fairly raised if not presented to the court that has competence over factual matters. This stems from the institutional need to build a record before judicial review can be exercised on appeal. But with questions of law, we deem the matter fairly raised if the issue is presented to the district court; citation to a particular case has never been seen as part and parcel of fairly raising the issue below. The district court can, after all; find cases not cited by one party, and the opposing party has the obligation to help the court by presenting relevant precedent to it. Punishing one party so severely for its failure to exhaust all potentially relevant authority may well help district court judges get rid of cases, and give a windfall to parties lucky enough to come across a weak adversary, but it is hardly fair. De-

termining the law is, after all, a shared responsibility to be borne by the court and the litigants. Where the district judge misses a key precedent and therefore renders an erroneous ruling, the consequences of that error should not be visited entirely on one of the parties.

Finally, the panel's contrary result is also hard to square with our long-standing rule requiring liberal constructions of pleadings in civil rights cases. *See, e.g., Buckey v. County of Los Angeles*, 968 F.2d 791, 794 (9th Cir. 1992), *cert. denied*, 61 U.S.L.W. 3287, 3314, 3394, 3400 (Nov. 30, 1992) (Nos. 92-560 & 92-628); *Gobel v. Maricopa County*, 867 F.2d 1201, 1203 (9th Cir. 1989). Applying an unprecedented rule of strict construction to a category of cases where we have a tradition of going out of our way to reach the merits is the sort of procedural legerdemain that might make sense to those trained in the law, but it does nothing to enhance public confidence in our federal courts.

In sum, the panel has lost sight of the fundamental issue in a section 1983 case: whether or not the officials in question have violated the rights of citizens. Qualified immunity diminishes somewhat the remedies afforded by law to the allegedly wronged individual, but the standards for a grant of immunity reflect a careful balancing process that takes great pains to protect the plaintiff's substantive rights. In defining qualified immunities, each rule must be judged both in terms of how well it protects the substantive right conferred by the statute, and of how much breathing room it gives government officials who must make hard decisions while performing discretionary functions. The panel's rule does nothing at all to help government officials discharge their responsibilities; its only effect is to diminish the rights of aggrieved plaintiffs. This is hardly the type of balancing the Court has said we must perform in adjudicating civil rights cases.

Conclusion

All those who enter the Supreme Court building are greeted by the words "Equal Justice Under Law." All too often this is on!y an aspiration. A party's success sometimes depends as much on the skill of his lawyer as on the strength of his case. But the panel here has taken what was heretofore only a necessary evil and elevated it to a rule of law.

Because I believe the panel has taken a giant step in the wrong direction in a very important area of the law, and that it is incumbent on us as a court to correct the error, I respectfully dissent from the order rejecting the suggestion for rehearing en banc.

REINHARDT, Circuit Judge, with whom Circuit Judge Pregerson joins, dissenting from the order rejecting the suggestion for rehearing en banc.

I join Judge Kozinski's excellent, if understated, dissent, and write separately to emphasize one or two additional points. First and foremost—it is civil rights plaintiffs who once again are the object of hostile and discriminatory treatment by the federal courts. *Elder* sets forth the rule that, in considering a civil rights plaintiff's challenge to a state official's qualified immunity defense, appellate courts may not consider cases or precedents which the plaintiff failed to cite to the district court. As Judge Kozinski politely suggests, this is a limitation on appellate review previously unknown in the annals of Anglo-Saxon jurisprudence.

It remains to be seen whether the same bizzare rule will be applied when *defendants* fail to cite cases to the district court—but even if it is, it is clear that in the vast majority of instances, civil rights plaintiffs will bear the brunt of the *Elder* doctrine. First, plaintiffs are obliged by the nature of the principles governing qualified immunity to rely more heavily on case law than are defendants. The

primary means open to a plaintiff to demonstrate the clarity of the law violated by a state official, and thus to overcome a qualified immunity defense, is the citation of past cases which have established a given rule or legal principle. Defendants, by contrast, may rely simply on the *absence* of cases clearly establishing the relevant law. Defendants are therefore far less likely to fall victim to a rule which harshly penalizes the omission of a citation. Second, civil rights plaintiffs are at a substantial disadvantage with respect to legal resources. While civil rights defendants are generally represented by a legal office composed of a large number of state or local government attorneys, the overwhelming majority of civil rights plaintiffs are unable to obtain comparable representation. Few are in a position to hire a prestigious law firm with a raft of partners and associates, and only a small number obtain representation by an organization with a permanent legal staff of any size. Instead, the victims of civil rights violations must generally rely on lawyers who work in small law offices or as sole practitioners. These lawyers are usually overburdened and rarely have access to the resources and facilities available to the average attorney representing corporate or governmental clients. They are consequently more apt to miss a case than are their governmental opponents. In sum, while we do not yet know whether *Elder* is even formally neutral between civil rights plaintiffs and defendants, it is evident that as a practical matter it is not, and that it is the plaintiffs who will ordinarily fall victim to its inequitable strictures.

I emphasize that no other litigant—whether suing for an antitrust, tort, contract, or copyright violation—risks forfeiture of his right to have the controlling law applied to his case simply because he neglects to cite the appropriate precedent in the district court. For all other litigants, and in all other circuits, the law is the law, *regardless* of the citation of cases below and *regardless* of the quality of the plaintiff's lawyer; for a Ninth Circuit civil

rights plaintiff faced with a qualified immunity defense, however, the law is only controlling if his lawyer brings the particular case to the attention of the district court. Only in a civil rights case and only in our circuit can the failure to cite a particular decision render a federal appellate court powerless to provide a remedy for a blatantly unconstitutional act. Civil rights victims in the Ninth Circuit will thus be doubly victimized: first by a state or local official's violation of their constitutional rights; next when they seek to recover the damages to which they are entitled.

In this case, the panel may not invoke the familiar mantra that the result it reaches, however unjust, is ordained by precedent. No court has ever before concluded that decisional law is *lex non grata* or *loi disparu* if not cited to the district court, nor has any court ever before recognized the existence of the hybrid entity which the panel oxymoronically labels "legal fact." On the contrary, in at least three cases our court has expressly acknowledged its obligation to look beyond the cases cited by the parties in analyzing qualified immunity issues. *See* Kozinski, J., dissenting *supra* at 591. That the panel is itself solely responsible for the establishment of the paradoxical *Elder* rule is further evident from the fact that the rule was neither proposed nor discussed by the parties in their briefs. The panel's *sua sponte* invention of a rule which seriously disadvantages civil rights plaintiffs displays a disregard both for precedent and for the rights of the individuals involved.[1]

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[1] There is little comfort that an adherent of constitutional rights can take from *Elder*. It is worth noting, however, that while the panel attempts to tie our hands, it has *not* sought to change the district court's traditional role. Even under *Elder*, district courts knowledgeable in the law will continue to apply the relevant law whether or not it has been cited by the plaintiff. *See Elder*, 975 F.2d at 1396.

As Judge Kozinski notes, our en banc process is imperfect. In this respect it is no different from other judicial, governmental, or electoral processes. Misfires occur in all walks of life. However, one aspect of the error we commit here is unique. Under our rules, when we decide not to go en banc, the public is prohibited from learning how the court divided over the issue. The public is even prohibited from learning whether a majority of the court voted against en banc review.[2] The secrecy surrounding our en banc procedure is unhealthy. *See discussion in Harris v. Vasquez*, 949 F.2d 1497, 1539 (9th Cir. 1990) (Reinhardt, J., dissenting), *cert. denied*, 112 S. Ct. 1275 (1992). As in *Harris*, and as in all other en banc proceedings, I think the public, the bar, and the district judges would benefit from knowing the breakdown of the actual vote. For reasons I am not free to reveal, I believe that in the case before us disclosure of the vote would be particularly informative. For that reason, I am especially uncomfortable with the application of our secrecy rule; I will, however, comply with its dictates.

I can conceive of only one good reason for any of my colleagues to have voted against an en banc hearing in this case: because they believe that *Elder* can or will be sharply limted, and they therefore find it unworthy of en banc consideration. *Elder* is certainly susceptible to a future reading that leaves it with little or no significance.

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[2] In our circuit, an en banc call can be defeated even when a majority of the court does not vote against an en banc hearing. En banc review occurs only when an absolute majority of active judges votes in the affirmative. Thus, a tie vote will always defeat an en banc call. Similarly, a call will fail if a majority of those voting cast a "yes" vote but the "yes" votes do not outnumber the combined "no" votes and abstentions. *See generally Harris v. Vasquez*, 949 F.2d at 1539.

I should add that even where, as here, a dissent from an order denying en banc review is filed, the public cannot tell how many judges favored an en banc hearing. Judges who vote in favor of en banc review frequently do not join the dissent.

The panel only applied its novel rule after expressly stating that doing so would not result in an injustice. *See Elder*, 975 F.2d at 1396. According to the panel, its holdng does no injustice to Elder because consideration of the precedent which Elder failed to cite—*U.S. v. Al-Azzawy*[3]—would have made no difference to the outcome of his case. The panel said that even considering *Al-Azzawy*:

> . . . we are hard pressed to say that the law was so clearly established that a reasonable law enforcement officer in Holloway's shoes would understand that what he was doing violated a constitutional right. *See Ward v. County of San Diego*, 791 F.2d 1329, 1332 (9th Cir. 1986) (the court does not "require of most government officials the kind of legal scholarship normally associated with law professors and academicians"), *cert. denied*, 483 U.S. 1020, 107 S. Ct. 3263, 97 L. Ed. 2d 762 (1987).

Id.

In light of the panel's implicit admission that the result in *Elder* would have been the same with or without the proclamation of its novel rule, it is tempting to dismiss the rule as mere *dicta*. That may be difficult to do here, however, because the rule appears to constitute the raison d'etre for the opinion. Nevertheless, future panels may well conclude that the *Elder* rule should not be invoked if doing so would lead to an unjust result—specifically, if its application would cause a civil rights plaintiff who would otherwise prevail to lose his case.[4]

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[3] 784 F.2d 890 (9th Cir. 1985), *cert. denied*, 476 U.S. 1144 (1986).

[4] Judge Kozinski argues at n.1 of his dissent that, despite the language of the opinion, *Elder* cannot be interpreted to hold that the panel would have reached the same result if *U.S. v. Al-Azzawy* had been cited to the district court. He bases his argument on *his own* interpretation of *Al-Azzawy* and on the observation that it would be improper and illogical to invent a completely new legal doctrine in order to avoid considering a non-controlling case. Even if Judge Kozinski is correct that, properly construed, *Al-Azzawy* would require reversal of the district court, that cannot change the fact that the panel's view of *Al-Azzawy* was different. It was the panel's view that *Al-Azzawy* did not clearly establish the law, and it was on the basis of that interpretation of *Al-Azzawy* that the panel determined to apply its rule, believing that the result would not be affected. Thus, it is the panel's interpretation of *Al-Azzawy* that we must accept in construing its holding—not Judge Kozinski's. Similarly, that it was improper or illogical for the panel to promulgate a new legal rule under the circumstances present here does not change the fact that the panel did so. We cannot say that because the panel acted illogically or improperly, its opinion does not mean what its language plainly states.

Perhaps it is impatience that prevents me from simply awaiting that result. Doing so might well ensure a peaceful, dignified burial for the bizarre *Elder* rule. However, like Judge Kozinski, I do not believe it is appropriate to let a case which promulgates so glaring an error in so important an area of the law go unchallenged. Rather, I believe that, considering how significantly the *Elder* decision conflicts with precedent, practice, and our obligation to vindicate constitutional rights, we have a duty to correct the panel's error now. I believe we breach that duty by failing to take the case en banc. Thus, for the reasons I have expressed, and for those ably articulated by Judge Kozinski, I dissent from the order denying en banc review.

SUPREME COURT OF THE UNITED STATES

No. 92-8579

CHARLES K. ELDER,
Petitioner

v.

R. D. HOLLOWAY, *et al.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

June 28, 1993